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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THIOKOL CORPORATION, *et al.*,
Petitioners,
v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN; DOUGLAS B. ROBERTS, in his official capacity as Treasurer of the State of Michigan; and THOMAS M. HOATLIN, in his official capacity as Commissioner of Revenue of the State of Michigan,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consent of the parties hereto has been obtained and filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers

of Commerce. COST, which separately incorporated on December 11, 1991, has a membership of over 420 major multistate corporations, engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

Many of COST's members are engaged in business in the State of Michigan and thus have a particular interest in the ultimate settlement of the ERISA preemption and statute of limitations questions raised in this case. Moreover, all of COST's members are adversely impacted by the tax laws of one or more other states, where such state laws "relate to" ERISA employee benefit plans through either a reference to or connection with such plans. Given the broad impact on the United States business community and its employees of the preemption question that this case presents, COST has a duty to assist its members in obtaining more certainty regarding the extent of rights of each sovereign power, where federal and state statutory schemes overlap and arguably infringe upon one another.

SUMMARY OF ARGUMENT

Our common understanding of the principles governing ERISA preemption of state laws has evolved, with this Court's guidance, over the course of years since ERISA's preemption provision was first enacted and later reaffirmed to apply to state tax laws. The precept that a state tax law may "relate to" employee benefit plans for ERISA preemption purposes through either direct reference to, or connection with, such plans is clear beyond cavil. What remains *unclear*, however, is where the line is drawn between state tax laws that have a sufficient relation to employee benefit plans to warrant preemption, and those tax laws that are "too tenuous, remote or peripheral" to justify curbing state powers of taxation.

The time has come for the line to be drawn, and it should be drawn in such a manner as to imbue the ERISA preemption language with force and effect. Although the decided cases appear to rely on disparate factors and to yield numerous irreconcilable tests to determine when a state tax law has crossed the line, nevertheless a set of unified principles can be fashioned to resolve future preemption controversies. First, if the state tax law specifically refers to ERISA plans, it "relates to" those plans and must be preempted. Second, if the effect of the state tax law in question is to exert downward pressure on the amount of the benefit fund that will be available for the provision of benefits, the law "relates to" such fund and must be preempted. In both instances, even if this Court insists on testing the state tax law by reference to the "tenuous, remote or peripheral" analysis—which COST contends is logically applicable only to state tax laws that do *not* directly refer to employee benefit plans—the direct economic impact of the tax law on the employee benefit plans serves as a "line in the sand" of ERISA state tax preemption.

ARGUMENT

I. MANY STATES CURRENTLY IMPOSE TAX BURDENS ON ERISA PLANS, AS EVIDENCED BY OTHER ERISA PREEMPTION LITIGATION IN STATE AND FEDERAL COURTS, AND A TRUE LINE MUST BE DRAWN BETWEEN VALID AND PREEMPTED EXERCISES OF SUCH STATE TAXING JURISDICTION.

In making determinations whether state laws "relate to any employee benefit plan" in such a manner or to such an extent as to be subject to federal preemption under Section 514(a) of ERISA, 29 U.S.C. § 1144(a), this Court has to date "expressed no views about where it would be appropriate to draw the line" between valid and preempted state laws. *Shaw v. Delta Air Lines,*

Inc., 463 U.S. 85, 100 n.21 (1983). But sometimes, and particularly in the context of state taxation, a "bright line" test is needed to prevent the hindrance of interstate commerce by state regulation and to promote settled expectations. Thus, in *Quill Corporation v. North Dakota*, 504 U.S. 298, 312-316 (1992), this Court articulated a bright-line physical presence nexus standard for Commerce Clause purposes (relating to use tax collection duties); anything short of physical presence is insufficient to warrant the imposition of a duty on an interstate seller to become a tax collector.

A similar standard is needed regarding state tax preemption under ERISA. *Cf.* 29 U.S.C. § 1144(b)(5)(B)(i); *E-Systems*, 929 F.2d 1100 at 1103 (citing conference report on ERISA amendment). Numerous cases have been decided but little guidance has been given. A tension has arisen in the arena of ERISA state tax preemption, as state and federal courts pick and choose between (1) the expansive interpretation of ERISA's preemption language urged by this Court in *Delta, supra* (establishing that the key language, "relate to," contemplates that a state law will *either* have a connection with or refer to an ERISA plan) and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (the phrase "relate[s] to" must be given a "broad common-sense meaning"), and (2) the limitations thereto expressed by this Court in *Delta* (a state law "may affect employee benefit plans in too tenuous, remote, or peripheral a manner" to warrant preemption) and in *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Company, et al.*, 115 S. Ct. 1671 (1995) (absent a direct reference by a state law to ERISA plans, preemption may be premised upon acute, albeit indirect, economic effect of the state law upon such plans). Unfortunately, the result is the very inconsistency and lack of national uniformity in state regulation—specifically, state taxation—of employee benefit plans that the ERISA preemption language was designed to prevent.

For example, the States of Minnesota and Ohio (City of Akron) have been permitted to subject employee benefit plans and the contributions to such plans to certain state tax burdens, while the States of Texas and New York have not, on differing formulations of the factors and based on different lines in the sand. *Compare Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), *cert. denied sub nom. Boyle v. Smith*, 64 U.S.L.W. 3511 (March 18, 1996) (2% general health care provider tax that can be passed on to purchasers of services has only a tenuous, remote and peripheral effect on ERISA plans), and *Firestone Tire & Rubber Company v. Neusser*, 810 F.2d 550 (6th Cir. 1987) (2% municipal income tax on resident employees that must be withheld by employers deemed a non-preempted general tax of neutral application that applies to employees without regard to their status as ERISA participants), *with E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir. 1991) (2.5% Texas Administrative Services Tax, which taxes administrative fees received by a plan and sums received by beneficiaries of a plan, is preempted because it reduces future plan assets and the capability to pay benefits); *In the Matter of Morgan Guaranty Trust Company of New York*, 80 N.Y. 2d 44, 599 N.E.2d 656 (N.Y. Ct. App. 1992) (10% real property transfer gains tax is preempted because it imposes administrative burdens on plan and directly depletes funds otherwise available for provision of benefits); and *NYSA-ILA Medical and Clinical Services Fund v. Axelrod*, 74 F.3d 28 (2nd Cir. 1996), *on appeal to the United States Supreme Court sub nom. De Buono v. NYSA-ILA*, Docket No. 95-1594 (filed April 3, 1996) (.6% Health Facility Act tax imposed on revenues of ERISA plan-operated medical facilities is preempted because it depletes assets earmarked for provision of plan benefits).

Even the district court judges who heard the consolidated cases that are hereby being appealed to this court

could not agree on what the appropriate standards were, or where the line should be drawn. *Compare Akzo America, Inc. et al. v. Michigan Dep't of Treasury*, No. 4:93-CV-101, 1995 U.S.Dist. LEXIS 1784 (W.D. Mich. Jan. 13, 1995) (held, "tenuous, remote or peripheral" exception does not apply to state law that refers to an ERISA plan, therefore ERISA preempts Single Business Tax) *with Thiokol Corp. et al. v. Roberts*, 858 F. Supp. 674 (W.D. Mich. 1994) (held, Single Business Tax is neither direct or indirect tax on ERISA plans, and effect on such plans is incidental, therefore specific reference to ERISA plans is not dispositive).

Although a bright-line test may "appear[] artificial at its edges," *Quill*, 504 U.S. at 315, this Court's observations about the utility of such tests applies with equal force in the context of ERISA state tax preemption controversies:

> This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation."

Quill, 504 U.S. at 315-316 (*citing Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959)). Multistate business entities and their employees deserve to know where the line has been drawn in this arena as much as the petitioner and other affected parties in *Quill* did.

II. WHERE CONGRESS AFFIRMATIVELY EXERCISES ITS COMMERCE CLAUSE POWERS TO PREEMPT THE STATES' TAXATION OF AN OBJECT OR ACTIVITY, THIS COURT'S MANDATE IS TO INTERPRET AND TO APPLY SUCH PREEMPTION PROVISIONS IN A MEANINGFUL WAY.

It is time for this Court to draw the ERISA preemption line *somewhere*. Congress has engaged in an affirmative exercise of its Supremacy and Commerce Clause powers in this arena,[1] and as this Court previously stated in *Ingersoll-Rand*, 498 U.S. 133 at 138, where Congress "has expressly included a broadly worded pre-emption provision in a comprehensive statute such as ERISA, our task of discerning congressional intent is considerably simplified." Thus, when this Court limits the broad applicability of ERISA preemption to those state laws that are not "too tenuous, remote or peripheral" to warrant a finding that the law "relates to" the plan, *Delta*, 463 U.S. at 100 n.21, then it must reasonably define the circumstances that demonstrate a sufficient relation between the state law in question and employee benefit plans.

The existing cases decided by both this Court and lower federal and state courts articulate numerous and seemingly irreconcilable tests to determine when a state law has crossed the line.[2] Nevertheless, the facts and legal

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[1] *Cf. Delta*, 463 U.S. 85 and 98 (discussion of legislative history of Section 514(a) of ERISA, which indicates that Congress rejected a narrower preemption provision in favor of the present language).

[2] Compare *Akzo America, Inc. et al. v. Michigan Dept' of Treasury*, No. 4:93-CV-101, 1995 U.S. Dist. LEXIS 1784 (W.D. Mich. Jan. 13, 1995) (held, "tenuous, remote or peripheral" exception does not apply to state law that refers to an ERISA plan, therefore ERISA preempts Single Business Tax) with *Thiokol Corp. et al. v. Roberts*, 858 F. Supp. 674 (W.D. Mich. 1994) (held, Single Business Tax is neither direct or indirect tax on ERISA plans, and effect on such plans is incidental, therefore specific reference to ERISA is not dispositive). Both cases applied tests articulated by this Court to the same set of facts but arrived at opposite conclusions.

analysis presented in most of the cases suggest a set of unifying principles that may be utilized to resolve future preemption controversies in a settled manner. First, if a state tax law directly refers to ERISA plans, it logically and as a practical matter "relates to" those plans for ERISA preemption purposes. That alone should settle the matter. *Cf. The District of Columbia and Sharon Pratt Kelly, Mayor v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (because the District's Equity Amendment Act specifically referred to ERISA plans, preemption was appropriate "on that basis alone"); Petition, p. 8. By contrast, the application of the "tenuous, remote or peripheral" analysis to a state tax law that directly refers to ERISA plans does not make sense. A state statute either "refers to" ERISA plans or it does not, whereas a state statute's "connection with" ERISA plans is a subjective determination that may be tested by reference to the "tenuous, remote or peripheral" concepts. In fact, the question of subjectivity is endless in this context because the testing tools are themselves as subjective as the "connection with" determination.

Second, if a state tax law does not directly refer to ERISA plans—and even if this Court for any reason chooses to apply the "tenuous, remote or peripheral" analysis to state tax laws which do so with a specific reference—the tax scheme still has a "connection with" those plans that is not tenuous, remote or peripheral and therefore "relates to" those plans for ERISA preemption purposes, where the effect of the tax is to exert a downward pressure on the amount of the benefit fund that will be available for the provision of benefits.

If the line is drawn to preempt state taxes that operate to reduce the funds available to provide employee benefits, then the test would generally align with the federal tax treatment accorded such plans under the Internal Revenue Code. This test also has the effect of requiring that the state tax law affect relations between the principal ERISA

entities (employer, plan, plan fiduciaries, plan participants), and thus implicitly acknowledge the underlying purposes of ERISA itself. *Cf. Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises,* 793 F.2d 1456, 1467 (5th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987).

Such an approach would reconcile most, if not all, of the apparently disparate results in the above-cited cases, and would further serve to impose a uniform national standard upon ERISA preemption determinations with respect to state tax laws, or indeed that are alleged to "relate to" employee benefit plans. For instance, under the proposed test Minnesota would continue to be free to impose general taxes such as sales and excise taxes, when (as in the case of *Boyle, supra*) they are not imposed on the assets of or contributions to employee benefit plans and thus do not have a direct economic impact on the plan's available benefits or ability to fund benefits. Likewise, Akron's municipal income tax is not imposed on ERISA plans' income, but rather on the pre-contribution income of employees without regard to their participation in an ERISA plan; once a participant, the level of benefits available to an employee is not derivative of the economic impact of the tax in question.

On the other hand, the cases of *E-Systems, Morgan Guaranty* and *NYSA-ILA* continue to warrant ERISA preemption under the proposed test. As the court noted in *E-Systems,* the tax there operated to reduce future plan assets and the capability of the plans to pay benefits: "The cost of the plan must therefore increase for the employer and/or employees or the benefits must be adjusted downward to offset the tax bite. This is the type of impact Congress intended to avoid when it enacted the ERISA legislation." *E-Systems,* 929 F.2d 1100 at 1103. And that, of course, is the effect of the tax in this case. *See* Petition, pp. 18-19. The Court in *Morgan Guaranty* also cited the direct and adverse economic effect

of the tax at issue on the employee benefit plan's available funds: "Unlike other forms of general State regulation that may have only incidental effect on plan resources, the gains tax 'directly depletes the funds otherwise available for providing benefits' and flies 'in the face of ERISA's goal of assuring the financial soundness of such plans.'" *Morgan Guaranty*, 80 N.Y.2d 44 at 52.

Finally, the Second Circuit Court of Appeals in *NYSA-ILA* found that the tax in question " 'depletes those assets earmarked for the provision of health care benefits and, as a result, will cause the Funds to reduce benefits provided and/or to charge beneficiaries more in the future for benefits received.' " *NYSA-ILA*, 74 F.3d 28 at 30. Upon remand from this Court with instruction to reconsider its prior decision in light of the recent *Travelers* opinion of this Court, the Court of Appeals took pains in *NYSA-ILA* to articulate the distinctions between the operation of the taxes in each of the cases. *NYSA-ILA* concludes that the non-preemption result in *Travelers* rested on the fact that the statute at issue in *Travelers* did *not* impose surcharges on ERISA plans themselves, but rather on insurance carriers that provided coverage to the plans and their beneficiaries. In contrast,

> The facts of [*NYSA-ILA*] distinguish it from *Travelers*, because, unlike in *Travelers*, there is no third party between the plan and the tax imposed pursuant to the HFA. *Rather, the statute at issue depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan.* As we observed in our original opinion, the HFA imposes 'an immediate tax on payments and contributions which were intended to pay for participants' medical benefits . . . [and] thus directly affects the Fund in its principal role as an employee welfare benefit plan.'

Id. at 30 (emphasis added).

When the proposed test is applied to the case at issue, the result is clear: the Michigan Single Business Tax,

through a specific reference to ERISA plans, exerts a direct economic impact upon employee benefit plans, through the effective reduction of employer contributions and hence the benefit fund that will be available to provide benefits to plan participants.

III. THIS PETITION SHOULD BE CONSIDERED IN CONJUNCTION WITH, OR HELD IN ABEYANCE UNTIL DISPOSITION OF, THE PETITION IN *DE BUONO v. NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND*

Subsequent to the release of the above-referenced opinion of the Second Circuit Court of Appeals in *NYSA-ILA* (on remand from this Court), that case has been appealed to this Court a second time, *sub nom. De Buono et al. v. NYSA-ILA Medical and Clinical Services Fund et al.*, S. Ct. Docket No. 95-1594 (filed April 3, 1996). This Court has since requested the Solicitor General to provide a brief commenting on the views of the Administration regarding the proper scope of ERISA preemption. The present case presents equally compelling issues for review, and your *amicus* respectfully requests that this Court either (1) consider the present Petition in conjunction with the Petition in *De Buono, supra,* because the Court will accord itself the broadest presentation of issues, perspectives and analyses that pertain to remaining ERISA state tax preemption controversies in this manner, or (2) hold this Petition in abeyance until a decision has been reached whether to grant review of the *De Buono* case, as the Solicitor General may well provide additional insight into the merits of this case, by addressing the related questions presented by the *De Buono* Petition.

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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